



U.S. Environmental Protection Agency

October 2, 1998

MEMORANDUM

SUBJECT: Inclusion of Contribution Waiver by Private Parties in CERCLA Administrative and Judicial Settlements

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I. Background Information

On July 13, 1995, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) issued the revised Model Remedial Design/Remedial Action Consent Decree (1995 RD/RA model). One of the important changes contained in this revision was the inclusion of a waiver of private contribution claims against certain parties that contributed only municipal solid waste (MSW) or municipal sewage sludge (MSS), or that

contributed only “de micromis” amounts of waste (see paragraph 90). The inclusion of this waiver represented an important component of EPA’s Administrative Reform efforts to protect those parties that are on the periphery of the liability scheme and are most likely to incur transaction costs that far exceed their share of responsibility at the site. EPA guidance already provided that the government would exercise enforcement discretion and decline to pursue these parties, but this did not insulate such parties from contribution actions by other potentially responsible parties (PRPs) at the site.

The language constituting this waiver of third-party claims was enclosed in brackets in the 1995 RD/RA model, indicating that each consent decree should be evaluated for the appropriateness of including this waiver language. Although not explicitly stated, there was a strong presumption that consent decrees should include this language. A review of recent consent decrees indicates that this language is rarely included in final RD/RA consent decrees. Other agreements (such as removal AOCs, de minimis settlements, cost recovery settlements, etc.) rarely contain this language either. In addition, revisions to the waiver language are necessary based on guidance developed subsequent to the issuance of the 1995 RD/RA model. Attached to this memorandum is the revised language. In our continuing effort to maximize protection for these parties, and thereby reduce transaction costs, routine use of the revised waiver in RD/RA consent decrees and other types of agreements is required. This memorandum explains the reasons behind changes to the language and details how the provision should be utilized.

II. **Revisions to Model RD/RA Language**

A. **Revisions to “De Micromis” Contribution Waiver Language**

The waiver provision of the 1995 RD/RA model contained two components: the first was a waiver against certain MSW/MSS-only contributors (subparagraph a.), and the second was a waiver against “de micromis” parties (subparagraph b.). The revised provision is shown in the attachment to this memorandum. The language has been revised to bring it into conformance with the February 5, 1998 *Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites* (revised MSW policy)¹ and the June 3, 1996 *Revised Guidance on CERCLA Settlements with “De Micromis” Waste Contributors* (revised “de micromis” guidance). It has also been restructured into two provisions, one for use if there is MSW or MSS at the site, and one for use if there is no MSW or MSS at the site. Regions have discretion to decide which of the two provisions is appropriate for the site.

To provide additional protection to qualifying “de micromis” parties, the introductory language of the waiver has been enlarged so as to preclude all claims for contribution concerning

¹ A clarification to this policy, entitled *Municipal Sewage Sludge Under the Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites*, was issued on July 15, 1998. This memorandum discusses what constitutes MSS.

the site, not just those arising under Section 107 and 113 of CERCLA. The waiver has also been amended to include a bracketed reservation of rights permitting a settling party to assert defenses and counterclaims against any qualifying “de micromis” party who brings an action against that settling party relating to the site. This may be used if requested by a settling party.

B. Waiver of Claims Against "De Micromis" Contributors at Sites Containing MSW or MSS

In accordance with the revised MSW policy, we have eliminated the special categories of MSW/MSS-only contributors contained in subparagraph a. of the 1995 RD/RA model and have substituted a provision for use at sites with MSW or MSS that is strictly based on volume. This change reduces the number of defined terms that are needed for the waiver from six to two. The definitions of “municipal solid waste” and “municipal sewage sludge” (formerly “sewage sludge”) remain in updated form (see attachment), but the definitions of “owner, operator, or lessee of residential property,” “residential property,” “small business,” and “small nonprofit organization” are deleted. To reflect the changes made by the revised “de micromis” guidance, the presumptive MSW/MSS-only volumetric cut-off has been raised to 0.2% of the total volume of waste at the site.

The revised waiver for use at MSW/MSS sites is written to cover both MSW/MSS-only contributors and the “hybrid” contributor of MSW/MSS and material containing hazardous substances, but not constituting MSW/MSS. To qualify for the waiver, the party’s contribution of MSW/MSS must not exceed 0.2% of the total volume of waste at the site, and the party’s contribution of material containing hazardous substances, but not constituting MSW/MSS, must not exceed the greater of 1) 0.002% of the total volume of waste at the site, or 2) 110 gallons of liquid materials or 200 pounds of solid materials.

C. Waiver of Claims Against "De Micromis" Contributors at Sites not Containing MSW or MSS

This section of the waiver also requires changes to reflect the revisions in the 1996 “de micromis” guidance. The previous presumptive numeric cut-offs have been doubled to 110 gallons/200 pounds of material containing hazardous substances to reflect the increased ceiling in the revised guidance for “de micromis” eligibility. In addition to the presumptive numeric cut-offs being increased, the volumetric percentage from the revised “de micromis” guidance has been included, which is 0.002% of the total volume of waste at the site. Thus, to qualify for the waiver (for use at sites with no MSW or MSS), the party’s contribution of material containing hazardous substances must not exceed the greater of 1) 0.002% of the total volume of waste at the site, or 2) 110 gallons of liquid materials or 200 pounds of solid materials.

D. Optional De Minimis Waiver Provision

Paragraph 91 of the revised waiver (see attachment) is an optional provision requiring

settling parties to waive claims against persons who have entered into a final CERCLA §122(g) de minimis settlement with EPA at the site as of the effective date of the agreement. The regions have discretion to insert this provision where appropriate and are strongly encouraged to use it whenever EPA has concluded a de minimis settlement at the site.

E. Revision to "Effect of Settlement; Contribution Protection" Provision of 1995 RD/RA Model

As written, Section XXIII, Paragraph 91, of the 1995 RD/RA model provides that nothing in the consent decree creates any rights in non-settling parties and allows settling defendants to reserve all rights against non-settling parties (see first and third sentences). Use of the revised waiver provision requires this paragraph to be amended (and renumbered) to provide that no rights are created in non-settling parties and all rights are reserved against non-settling parties, except as provided in the revised “de micromis” waiver in Paragraph 90 and, when used, the optional de minimis waiver in Paragraph 91. Revised language for the effect of settlement provision is included in the attachment. Other EPA models containing this language also require these revisions whenever the waiver is used.

III. Contribution Waivers in Future Agreements

A. Applicability to Judicial and Administrative Settlements

All model CERCLA settlement agreements should be revised to include the attached contribution waiver provision, and the brackets previously surrounding the waiver language in the 1995 RD/RA model should be deleted. With the issuance of this directive, there is a presumption that a waiver of contribution claims against “de micromis” parties will be in all new RD/RA consent decrees and all other CERCLA administrative and judicial settlement agreements, except for settlements relating exclusively to penalties or treble damages. Just as we expect PRPs to comply with other Agency policies in performance of response action, each settlement agreement represents our opportunity to ensure that PRPs comply with Agency policy regarding “de micromis” parties.

B. Requirements for Headquarters Consultation

Consistent with our Administrative Reform efforts, the Agency continues to seek ways to protect “de micromis” parties from incurring transaction costs. Settlements provide the sole opportunity to secure assurances from settling parties that they will not pursue these parties. Based on the importance of this effort to our Administrative Reform agenda, we are instituting a requirement that regions consult with the Director of the Regional Support Division, Office of Site Remediation Enforcement (Director-RSD), prior to 1) deleting the “de micromis” waiver from a settlement agreement, or 2) modifying the presumptive cut-offs in the provision. However, in an effort to minimize the impact of this requirement, we have identified the following three exceptions where such consultation is not needed:

1) the waiver may be deleted if the region determines that the only PRPs at the site are owners and operators;

2) the waiver may be deleted if the agreement is entered into prior to issuance of a Record of Decision (ROD) for the site and inclusion of the waiver will cause delay in cleanup-related activities. We realize that at the early pre-ROD stage there may be insufficient waste-in information upon which to evaluate whether the presumptive cut-offs are appropriate for the site or upon which to develop alternative “de micromis” cutoffs. Thus, the regions have flexibility to delete the waiver where they believe that insistence on its inclusion will result in unacceptable delays in achieving studies or cleanup; and

3) the presumptive cut-offs may be replaced if the region has formally established a different cut-off for the site through a prior “de micromis” settlement or a prior “de micromis” settlement waiver. The revised “de micromis” guidance recognizes that although the presumptive cut-offs will be applicable at most sites, EPA may determine that site-specific factors may justify altering these amounts. Absent a concluded “de micromis” settlement or inclusion of a different cut-off in a previous “de micromis” waiver for the site, however, any change to the model cut-offs will still require prior consultation with RSD.

For RD/RA consent decrees, this consultation requirement applies to any settlement in negotiation now or issued in the future. For all other settlements, this consultation applies to all negotiations where the initial proposed settlement is sent by EPA to private parties after the date of this memorandum. The contact for the required consultation is Victoria van Roden of RSD. Victoria can be reached at 202-564-4268.

IV. Conclusion

As noted above, EPA and DOJ continue to strive to protect parties from, as well as decrease transaction costs associated with, inappropriate contribution litigation. Since the United States is not a party in private contribution actions, a Federal settlement may provide our best opportunity to influence the associated litigation. Every settlement should be evaluated to ensure the broadest release of contribution claims that is appropriate for the particular situation. In addition to use of the appropriate “de micromis” waiver, negotiators of every settlement should also evaluate whether the waiver of contribution claims against de minimis parties shown in Paragraph 91 of the revised waiver should be used and whether waivers of claims against any other parties (e.g., inability-to-pay settlers) is appropriate. Questions regarding the appropriate scope of the waiver for your settlement may be directed to Janice Linett of RSD at 703-978-3057 or Tom Mariani of the Environmental Enforcement Section of DOJ at 202-514-4620.

Attachment

NOTICE: This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Government. This guidance is not a rule and does not create any legal obligations. Whether and how the United States applies the guidance to any particular site will depend on the facts at the site.

ATTACHMENT

NEW MODEL “DE MICROMIS” WAIVER LANGUAGE FOR ALL AGREEMENTS

90. Settling [Defendants/Respondents] agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person’s liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if

[Use subparagraphs (a) and (b) if there is MSW or MSS at the Site.]

(a) any materials contributed by such person to the Site constituting Municipal Solid Waste (MSW) or Municipal Sewage Sludge (MSS) did not exceed 0.2% of the total volume of waste at the Site; and

(b) any materials contributed by such person to the Site containing hazardous substances, but not constituting MSW or MSS, did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

[Use if there is no MSW or MSS at the Site.]

the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

[Use in all cases.]

This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. [This waiver also shall not apply with respect to any defense, claim, or cause of action that a Settling [Defendant/Respondent] may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling [Defendant/Respondent].]

[Use as appropriate if a de minimis settlement has been concluded at the Site.]

91. Settling [Defendants/Respondents] agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final CERCLA §122(g) de minimis settlement with EPA with respect to the Site as of the effective date of this [Consent Decree/Consent

Order/Agreement]. [This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling [Defendant/Respondent] may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling [Defendant/Respondent].]

REVISED DEFINITIONS OF “MUNICIPAL SEWAGE SLUDGE” AND “MUNICIPAL SOLID WASTE”

“Municipal sewage sludge” shall mean any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage, and may include residue removed, all or in part, during the treatment of wastewater from manufacturing or processing operations, provided that such residue has essentially the same characteristics as residue removed during the treatment of domestic sewage.

“Municipal solid waste” shall mean household waste and solid waste collected from non-residential sources that is essentially the same as household waste. While the composition of such wastes may vary considerably, municipal solid waste generally is composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D landfills.

REVISED “EFFECT OF SETTLEMENT” PROVISION FOR USE WITH “DE MICROMIS” WAIVER

91 92. Except as provided in Paragraph 90 (Waiver of Claims Against “De Micromis” Parties) [and Paragraph 91 (Waiver of Claims Against De Minimis Parties)], nothing in this [Consent Decree/Consent Order/Agreement] shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this [Consent Decree/Consent Order/Agreement]. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Except as provided in Paragraph 90 (Waiver of Claims Against “De Micromis” Parties) [and Paragraph 91 (Waiver of Claims Against De Minimis Parties)], each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.